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Understanding the DOJ's Airlines Antitrust Investigation

From the Experts

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Stock prices dropped, at least nine class action suits have been filed and Congress is piling on the pressure to find wrongdoing following recent news of the latest target of the U.S. Department of Justice's antitrust division: the United States airline industry. Indeed, the news that DOJ has issued civil investigative demands (CIDs) to the major U.S. airlines has led some commentators to suggest that this could turn into a major criminal investigation. U.S. Senator Chuck Schumer, D-New York, also has made some grave assumptions in his request that "the feds step up their efforts . . . immediately" and enlarge their investigation to include other practices he believes are anti-competitive.

There is a long way, however, from a CID to criminal charges alleging violations of the Sherman Act. Given the airline industry's familiarity with the antitrust division, which conducted a major criminal investigation of the industry from 2005-2011 and also has scrutinized several high-profile mergers, it is difficult to believe that the airlines would engage in collusion. It is even harder to believe that, if they did, they would create documentary evidence of their unlawful coordination. Without that kind of tangible corroboration, the likelihood that DOJ would bring criminal charges is greatly diminished.

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Background of the Investigation

News broke on July 2 that DOJ had launched an investigation into possible collusion between several major U.S. airlines. According to media reports, sources involved in the investigation have disclosed that DOJ is examining alleged efforts to inflate ticket prices by limiting capacity on commercial flights. Capacity limitations come in the form of reducing service on certain flight routes or eliminating flight routes altogether. American Airlines, United Airlines, Delta Air Lines and Southwest Airlines all have confirmed that they received CIDs in connection with this investigation. No other airline has publicly acknowledged contact from DOJ.

The four carriers currently control approximately 80 percent of the domestic airline market. While nobody has pointed to any actual evidence of collusion among the airlines, consumer advocacy groups and lawmakers like Sen. Richard Blumenthal, D-Connecticut, have sounded the antitrust alarm. They point to this consolidation of market power combined with recent record profits as a sign that something must be amiss. Their suspicions are magnified because it seems like the plunge in jet fuel prices this year should have resulted in a corresponding drop in ticket prices, but exactly the opposite has occurred.

DOJ has requested that the airlines produce documents and communications between carriers (and to stockholders and research analysts) about their plans for flight capacity. Specifically, the department requested documents demonstrating "the need for, or the desirability of, capacity reductions or growth limitations by the company or any other airline." The agency also has requested regional reports of the airlines' monthly capacities dating back to 2010. Though the four airlines are currently at the center of the probe, the investigation could have larger ramifications for the rest of the industry as more information is revealed. Indeed, Schumer's request that DOJ also look into some airlines' practice of not allowing third-party websites to sell their tickets may indicate that a more expansive investigation is on the horizon.

The Antitrust Trend

Even while the carriers deny liability, the industry is justifiably concerned that the

current investigation will be costly. At best, the airlines will spend many millions of dollars in legal fees and escape any prosecution. At worst, this investigation could follow the trend of several recent industry-wide investigations with DOJ seeking guilty pleas from numerous airlines and billions of dollars in fines. For instance, the 2005-2011 airline fuel surcharge investigation, which was prompted by German-based Lufthansa voluntarily informing DOJ that it had been conspiring with competitors to set cargo fuel surcharges, metastasized into one of the largest antitrust investigations in U.S. history. By the end, the agency had obtained more than $1.7 billion in fines from more than 20 companies and charged approximately 19 individuals with crimes. In 2011, DOJ raised the stakes with an even bigger antitrust investigation into the auto parts industry. In that investigation, which is still ongoing, DOJ has to date obtained guilty pleas from 35 companies, filed charges against at least 52 individuals and obtained more than $2.5 billion in criminal fines.

Both the fuel surcharge and auto parts investigations were driven by DOJ's Amnesty Plus program and the cooperation it encourages. Under this program, the first company to come forward and acknowledge its participation in a criminal antitrust violation can avoid criminal conviction, prison terms and steep fines in exchange for extensive cooperation. DOJ encourages companies to offer cooperation as early as possible by offering "markers" to companies that confess to anti-competitive behavior. Companies often approach DOJ when they discover some evidence of illegal coordination even though they are unaware of the specific details or extent of any collusion. The marker ensures a company's place at the front of the line for amnesty, allowing it to gather the remaining information necessary to complete an application for leniency. The evidentiary standard for obtaining a marker is fairly low, and the company does not need to admit that it definitively engaged in unlawful coordination in order to obtain a marker.

The Justice Department has successfully used the Amnesty Plus program to build industry-wide antitrust cases. As soon as one company agrees to cooperate, the DOJ usually is able to use the information from the cooperating company to coerce other companies into guilty pleas, creating a wave of convictions. For instance, DOJ was able to use evidence provided by Lufthansa to obtain a warrant to raid British Airways' offices at John F. Kennedy Airport. British Airways was one of the first of the 21 airlines to plead guilty in the fuel surcharge investigation. These convictions, of course, do not stop with the companies; DOJ often requires company employees who participated in any collusion to be "carved out" from any plea agreement and charged individually.

For that reason, critical employees may be at risk if the DOJ investigation gains traction. And, by extension, the airlines that depend on their efficient and competent service also will be at risk.

Companies can protect their key employees from prosecution in two main ways:

1. Early and helpful cooperation that might make the government more inclined to expand the scope of any eventual plea agreement to include more individuals and fewer "carve-outs."
2. Hiring separate counsel who can work with the companies' counsel to press substantive positions with DOJ in an effective, coordinated way while providing reassurance to key employees that their interests are being protected.

Looking Forward

DOJ's ability to bring criminal charges against the airlines will come down to one critical fact: whether any documentary evidence exists to support allegations of collusion. This could include emails between carriers, pricing charts, meeting notes, calendar entries or any other form of written evidence documenting unlawful communications. If such evidence exists, it will emerge in documents provided through the civil investigative demands or by any amnesty applicant.

Documentary evidence is the linchpin of any antitrust conviction—for both companies and individual employees. The Amnesty Plus program, which provides significant incentives for companies and individuals to cooperate with the government, is DOJ's greatest asset in pursuing evidence. But it can also be its Achilles' heel—the program that generates substantial information also renders all of it vulnerable to impeachment. As with any testimony obtained through cooperation, defense attorneys can argue that people (and companies) will say anything in order to avoid being prosecuted. Unless there is a corroborating email, memo or note, DOJ cannot credibly base a prosecution on one airline executive's uncorroborated testimony—while seeking cooperation credit—that he or she colluded with other airline officials to fix prices. That is especially so for a high-profile prosecution implicating billions of dollars, attracting press scrutiny and pitting DOJ's lawyers against the best defense lawyers in the country.

Indeed, despite cries from advocacy groups, the existence of this type of evidence seems unlikely. While memorialized forms of blatant antitrust violations appear frequently in foreign markets—where criminalization of competitor coordination is recent or nonexistent—written price-fixing charts and similar documents are far less likely to be found in the possession of domestic companies. Also, given that so many airlines have been convicted for Sherman Act violations related to fuel surcharges within the past eight years, one would expect the airline industry—and U.S. airlines in particular—to act with extreme care when it comes to possible antitrust violations. Finally, not only did DOJ's major fuel surcharge investigation serve as a cautionary tale to industry peers, but the airlines already have been placed under a microscope by antitrust regulators after the mega-mergers of the past few years.

It is too early to make any prediction about the course of this investigation. But notwithstanding the rhetoric of the politicians and consumer groups, DOJ faces significant challenges in bringing criminal charges against any of the U.S. airlines or their executives.

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